



**ISSUES**

The respondent requested Appeals Board review of the following issues:

- (1) Whether the 1996 amendment to K.S.A. 44-501(c) that deleted the requirement that an injured worker be disabled for a week before he or she was eligible for permanent disability and specifically provided for retroactive application of the amendment to all cases not fully adjudicated on the effective date of the amendment is constitutional.
- (2) Whether claimant was disabled for a period of at least one week from earning full wages.
- (3) The nature and extent of claimant's disability.

Claimant, in his brief and at oral argument before the Appeals Board, raised the following additional issues for Appeals Board review:

- (4) Whether claimant is entitled to future medical treatment.
- (5) Whether claimant is entitled to the maximum unauthorized medical expense.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge concluded that the 1996 Legislature's amendment to K.S.A. 44-501(c) that deleted the requirement that claimant be disabled from work for a week before he or she was eligible for permanent disability and also made the amendment retroactive was a valid exercise of the legislature until declared unconstitutional by a court of competent jurisdiction. Accordingly, the Administrative Law Judge did not address the question of whether claimant was disabled for a period of at least one week from earning full wages.

The Administrative Law Judge awarded claimant permanent partial general disability benefits of 22 percent. The Administrative Law Judge based his award on claimant's treating physician's 30 percent permanent functional impairment rating and then reduced the 30 percent by 8 percent found to be preexisting by Dr. Koprivica. The Appeals Board finds, for reasons set forth below, that the Administrative Law Judge's Award should be modified.

(1) At the time this case was argued before the Appeals Board, the 1996 Legislature had amended K.S.A. 44-501(c) by deleting the language that required an injured worker to be disabled for one week from earning full wages before he or she could receive permanent disability and made such amendment retroactive for all cases not fully adjudicated on the effective date of the amendment, April 4, 1996. However, after this case was argued, the Kansas Court of Appeals in the case of Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. \_\_\_\_ (1997), found the retroactive application of the amended K.S.A. 1996 Supp. 44-501(c) (S. B. No. 649) to be an unconstitutional violation of due process. Therefore, the amendment does not apply to the case at hand and the issue of whether claimant's injury disabled him for a period of at least one week from earning full wages at work will be addressed.

(2) The claimant testified the low-back injury he suffered on September 22, 1993, while employed by the respondent, caused him to miss from eight to ten days of work from the date of his injury until he terminated his employment with respondent in May of 1994. Claimant left respondent's employment and took a similar job as a serviceman for U. S. Engineering in May of 1994. The Administrative Law Judge admitted into evidence at the regular hearing a written record from claimant starting in May of 1994 that indicated claimant missed some 88 hours or 11 days while working for U. S. Engineering as a result of pain and discomfort in his low back or medical treatment for his back. A written record was also admitted for the calendar year of 1995 that showed claimant missed 126 hours or 15.75 days of work while working for U.S. Engineering because of pain and discomfort in his back or for medical treatment for his back. Claimant testified he received no pay for the time he missed either while working for respondent or while working for U. S. Engineering. Carl Beebe, claimant's current supervisor at U. S. Engineering, testified that at various times since claimant had employed at U. S. Engineering claimant had to miss work because of pain and discomfort in his low back. Mr. Beebe also verified claimant received no pay for the time he had to miss work. Additionally, Mr. Beebe testified claimant was provided assistance from other employees when he was required to lift heavy items because of his low-back problem.

Claimant's treating physician, orthopedic surgeon Brian E. Healy, M.D., and P. Brent Koprivica, M.D., a physician retained by the respondent to perform an independent medical examination of claimant, both testified in this case. Both of these physicians testified that claimant's preexisting asymptomatic Grade II spondylolisthesis condition had become symptomatic as a result of claimant's September 22, 1993, work-related accident. Additionally, both physicians testified this symptomatic condition that followed the work-related injury would cause claimant to miss work from time to time.

Respondent argues claimant was not taken off work because of his work-related injury by a physician and, therefore, claimant's entitlement to workers compensation benefits is limited to only medical compensation as provided for in K.S.A. 44-501(c). Furthermore, respondent contends claimant's testimony, that because of his low-back problem he missed eight to ten days of work after the accident while employed by the

respondent and an additional 26.75 days work in 1994 and 1995 while employed by U. S. Engineering without pay, is speculation on claimant's part and lacks probative value. However, respondent did not present any evidence to contradict claimant's testimony and the records of time missed because of his continuing low-back problem.

The Appeals Board finds the testimony given by claimant, claimant's current supervisor, as well as, Dr. Healy, and Dr. Koprivica establish that following claimant's September 22, 1993, work-related accident, claimant missed more than one week from earning full wages as a result of his work-related low-back injury. Therefore, the Appeals Board concludes claimant's entitlement to workers compensation benefits is not limited to medical compensation as provided in K.S.A. 44-501(c).

(3) The only dispute in this case concerning the nature and extent of claimant's disability is the appropriate percentage of claimant's permanent functional impairment. Work disability was not an issue.

Dr. Healy and Dr. Koprivica both testified and expressed their opinions on claimant's permanent functional impairment. Dr. Healy testified claimant's work-related low-back injury resulted in a 30 percent permanent functional impairment. Dr. Koprivica testified claimant suffered a 15 percent permanent impairment of function as a result of his work-related injury. The Administrative Law Judge, because the parties could not agree on claimant's permanent functional impairment, ordered an independent medical examination of claimant with orthopedic surgeon C. Erik Nye, M.D. Dr. Nye did not testify but his report dated November 13, 1995, sets out his findings from the independent medical examination of claimant and it is a part of the record. In that report, Dr. Nye opined that claimant had a 12 percent permanent functional impairment related to the September 22, 1993, work-related accident.

The Administrative Law Judge awarded claimant a 22 percent permanent partial general disability finding that Dr. Healy's 30 percent permanent functional impairment rating was the most credible opinion on functional impairment but reduced that rating because of Dr. Koprivica's opinion that claimant's preexisting spondylolisthesis condition represented an 8 percent permanent functional impairment. The Administrative Law Judge found K.S.A. 44-501(c) required a deduction for claimant's preexisting functional impairment.

The respondent argues the most credible opinion regarding claimant's permanent functional impairment is Dr. Nye's 12 percent rating. The respondent contends Dr. Nye's opinion, as the court appointed independent medical examiner, is the most credible because he is a neutral physician who had no special interest in the outcome of the case. On the other hand, claimant argues Dr. Healy's 30 percent permanent partial disability rating is the most credible because Dr. Healy, as the treating physician, was the most familiar with claimant's injury and resulting disability. However, claimant disagrees with the Administrative Law Judge reducing Dr. Healy's functional impairment rating by 8 percent

for claimant's preexisting spondylolisthesis condition. Claimant argues the testimony of Dr. Koprivica established that claimant's preexisting spondylolisthesis condition had never before been rated and was asymptomatic before the September 22, 1993, work-related accident. The work-related injury then caused the preexisting condition to be symptomatic. Before the September 22, 1993, accident, claimant was not restricted from performing any type of work and the asymptomatic spondylolisthesis condition would not have qualified as a permanent functional impairment in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

The Appeals Board finds Dr. Koprivica's 15 percent permanent functional impairment rating the most credible opinion contained in the record. Although Dr. Koprivica only examined the claimant on one occasion, he had the benefit of claimant's medical treatment records and, as required by K.S.A. 44-510e, based his functional impairment rating on the AMA Guides. In contrast, Dr. Healy's 30 percent permanent functional impairment rating was first made without looking at the AMA Guides as he noted in his medical record dated November 22, 1994. Dr. Healy also testified he did not use the AMA Guides Third Edition (Revised) but used the Fourth Edition of the AMA Guides just to support his initial rating. Dr. Nye, in his report dated November 13, 1995, did not make reference as to whether or not he used the AMA Guides as a basis for his 12 percent rating.

The Appeals Board also concludes claimant's unknown preexisting, asymptomatic, spondylolisthesis condition did not constitute a permanent functional impairment before his September 22, 1993, work-related injury. Accordingly, the Appeals Board finds no preexisting functional impairment existed and, therefore, K.S.A. 44-501(c) does not apply.

In conclusion, the Appeals Board finds the claimant is entitled to permanent partial general disability benefits based on the 15 percent permanent functional impairment rating of Dr. Koprivica.

(4) The Administrative Law Judge found claimant was not entitled to an award of future medical benefits. The Appeals Board disagrees and finds that both Dr. Healy and Dr. Koprivica testified it was reasonable to expect claimant to require medical treatment in the future for his low-back injury. Therefore, the Appeals Board concludes future medical treatment should be ordered upon proper application to and approval by the Director.

(5) The Administrative Law Judge also denied claimant an award for the unauthorized medical allowance as provided for in K.S.A. 44-510(c)(2). The record before the Administrative Law Judge does not contain proof that claimant was entitled to the unauthorized medical allowance. Nevertheless, the Appeals Board finds claimant is entitled to the unauthorized medical allowance up to the statutory maximum upon presentation of an itemized statement verifying same.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated August 7, 1996, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Richard C. Jones, and against the respondent, Carrier Corp., and its insurance carrier, CIGNA, for an accidental injury which occurred on September 22, 1993.

Claimant is entitled to 62.25 weeks of permanent partial disability compensation at the rate of \$313 per week for a total award of \$19,484.25, which is found to be all due and owing and therefore ordered paid in one lump sum less any amounts previously paid.

Further award is made entitling claimant to future medical expenses upon proper application to and approval by the Director.

Claimant is also entitled to unauthorized medical expenses up to the statutory maximum upon presentation of an itemized statement verifying same.

All remaining orders contained in the Administrative Law Judge's Award are adopted by the Appeals Board as if specifically set forth in this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Keith L. Mark, Mission, KS  
Gary R. Terrill, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director